

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ROBERT LEE DELOACH, #41182

PETITIONER

VS.

CIVIL ACTION NO.1:05CV0023-SA-JAD

LAWRENCE KELLY, ET AL.

RESPONDENTS

REPORT AND RECOMMENDATION

The respondents have moved to dismiss the petition for failure to prosecute and for failure to comply with the order of the court(Doc.33).

The petition in this action was initially filed on January 18, 2005. After being granted several extensions of time, due to heavy caseloads of the responsible attorneys, the respondents filed a motion to dismiss on August 1, 2005. The respondents moved to dismiss the entire petition for failure to exhaust all of the claims. Alternatively the respondents requested that Deloach be required to submit an amended complaint omitting the unexhausted claims. This motion to dismiss placed Deloach on notice of his need to exhaust all claims in the state court some 6 weeks prior to the expiration of his AEDPA statute of limitations. Deloach did not take any steps at that time to pursue exhaustion of his claims in state court.

The undersigned recommended on November 11, 2005, that the court stay this action in order to grant Deloach the opportunity to exhaust all claims in state court. On March 23, 2006, over the objection of the respondents, this court stayed the case. The court's order instructed Deloach to file his state post-conviction action within thirty days of the order. It also directed the petitioner to file a motion to lift the stay within thirty days of the conclusion of the state post-conviction action.

On January 29, 2008, the respondents filed the present motion to dismiss. The motion and exhibits show that Deloach complied with the order of the court by filing his state post-conviction action on April 10, 2006. The Mississippi Supreme Court denied relief on the post-conviction application on May 26, 2006. Deloach was required to file a motion to lift the stay on or before June 28, 2006. One year, seven months and 29 days later, Deloach has done nothing to prosecute his petition or to comply with the order of the court. He has filed no response to the motion to dismiss which has now been pending for four weeks. He has provided no explanation or excuse for this extraordinary delay.

The undersigned recommends that the petition be dismissed with prejudice due to the petitioner's failure to prosecute the claim and for failure to comply with the order of the court.

The parties are referred to 28 U.S.C. 636(b)(1) and Local Rule 72.1(C) for the appropriate procedure in the event any party desires to file objections to these findings and recommendations. Objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed finding and recommendations contained in this report within ten days from the date of filing will bar an aggrieved party from challenging on appeal both the proposed factual findings and the proposed legal conclusions accepted by the district court *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

Petitioner is directed to acknowledge receipt of this report and recommendation by signing the enclosed acknowledgment form and returning it to the court within ten days of this date. Petitioner is warned that failure to comply with the requirements of this paragraph may lead to the dismissal of this lawsuit under F.R.Civ.P. 41(b) for failure to prosecute and for failure to comply

with an order of the court.

This the 26th day of February, 2008.

/s/ Jerry A. Davis
UNITED STATES MAGISTRATE JUDGE